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No. 84-770

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

VS.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 126,
Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE ISSUE PRESENTED

May an issue be submitted to arbitration where the Labor Board has expressly declined to find that the Union's pursuit of the grievance is a violation of the NLRA and where the Board has deferred processing of the Union's charge over the same facts pending resolution of the dispute through arbitration?

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I

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II

COUNTER STATEMENT OF THE CASE

Because Save Mart has deleted a number of critical facts, it is necessary to present a counter statement of the case.

UFCW Local 126 has had a collective bargaining relationship with Save Mart for at least 30 years. During that period whenever a store was acquired or opened, Save Mart transferred the majority of the meat department employees from other stores represented by Local 126, and the contract was automatically applied.

In February of 1983, Save Mart opened a new retail store in Hanford

and chose a different course of action. Employees were not transferred from the current bargaining unit, laid off employees were not recalled to work at the Hanford Store and the referral procedure contained in the collective bargaining agreement was ignored. Thereafter the employer chose to operate the store non-union and refused to apply the collective bargaining agreement to the meat department employees.

Local 126 filed a grievance asserting, inter alia, that the employer had a contractual obligation to permit employees to transfer to the Hanford Store if they chose (consistent with the employer's own policy); that the employer had an obligation to utilize laid off employees from the other stores in preference to hiring new employees and finally that if no one else was available, the employer had an obligation to give preference to

those individuals who had signed up on Local 126's referral list. Each of these complaints was grounded in specific contractual language. In addition, the Union claimed that the contract should be applied to the meat department employees in Hanford, particularly, if the employer had complied with its contractual obligations set out above.

In response to the Union's grievance, the employer filed a charge with Region 32 of the NLRB asserting that the Union's pursuit of the grievance was an unfair labor practice within the meaning of 29 U.S.C. Section 158(b)(1)(A), No. 32-CB-1400. Region 32 dismissed the charge, and Save Mart appealed to the Office of the General Counsel which sustained the Region's dismissal of the charge and stated:

> "Here, however, assuming the Union is successful in its

grievances, the new facility would constitute a lawful accretion to the existing unit. Retail Clerks, Local 870 (White Front Stores) 192 NLRB 240. Therefore, it was concluded that the Union's grievance and court suit would not pursuit of an unlawful objective, even assuming, arguendo, that the Hanford Store might constitute a separate appropriate unit." (Letter from Office of Appeals sustaining dismissal of charge, dated August 5, 1983).

Dissatisfied with this result, the employer filed a "RM" Petition as well as a "UC" Petition seeking either an election or determination that the Hanford Store was a separate appro-

priate unit, Nos. 32-RM-251 and 32-UC-105. Once again, the Regional Director dismissed those petitions and the dismissal was affirmed by way of an order from the Board dated March 9, 1984.

On the other hand, the Union filed an unfair labor practice charge asserting that the employer's failure to apply the agreement at the Hanford Store was a violation of 29 U.S.C. Section 1580(a)(5), No. 32-CA-5774. Region 32 deferred processing the charge under the practice anunciated in Dubo Manufacturing Corporation 142 NLRB 431, in a letter dated September 30, 1983 to the parties. The Region stated:

> "The investigation has disclosed that the matter encompassed by the instant charge, specifically, the allegations that the Employer has unilat-

> erally changed its past practice and the terms of the collective bargaining agreement by refusing to transfer employees of its newly opened facility in Hanford, California, is presently the subject of a grievance arbitration proceeding under the provisions of the collective bargaining agreement between the Employer and the Union."

Thus, notwithstanding the employer's various efforts, the Board took the consistent position that the Union could lawfully pursue this grievance and furthermore declined to process the Union's Charge until the grievance was resolved through the arbitration process.

The District Court thereafter compelled arbitration and the parties selected Harvey Letter as their arbi-

trator. Arbitrator Letter issued his decision on December 6, 1984 finding that the employer's failure to apply the transfer, layoff or hiring provisions of the contract was violation of the contract, and furthermore, finding that as a result the contract should be applied to the Hanford Store. The Union has now filed a petition to confirm that arbitration award in the District Court for the Northern District of California.

We now turn within this factual setting to the reasons why, in this posture, this case is not one to resolve the issue which Save Mart asserts needs consideration by this Court.

III

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO POSSIBILITY OF ANY CONFLICT WITH THE LABOR BOARD DECISION.

A. Since the arbitrator has now issued his decision and the parties are litigating the validity of that award in another action, this matter is now moot. The question of the arbitrator's jurisdiction can easily be resolved in the action to confirm the arbitrator's award.

B. As can be seen from our counter statement of the facts, the issue was not solely that of the application of the current collective bargaining agreement to the Hanford Store but rather <u>initially</u> the issues concerned the contractual obligation with respect to the staffing of the store. The question initially presented to the arbitrator was whether Save Mart had to transfer employees, utilize laid off employees and/or utilize the referral procedure in the contract for applicants. Those questions do not involve questions con-

cerning representation even as described by Save Mart in its petition to this Court. It was only after resolving these issues, could the question of the application of the agreement to the Hanford Store be considered.

C. When this Court held that arbitration could proceed notwithstanding the fact that the same issue could be resolved by the Board, it also recognized that a decision of the Labor Board would prevail over any contrary arbitrator's decision. Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964). That holding has been followed by the Courts of Appeal and indeed the Ninth Circuit has repeatedly recognized that where there is a contrary decision, arbitration may either not be compelled or the arbitrator's decision may not be confirmed. See Frederick Meiswinkel v Laborers Union Local 261,

744 F. 2d 1374 (9th Cir 1984) and Carpenters Local Union 1478 v Stevens, 743 F. 2d 1271 (9th Cir 1984). On the other hand, the Ninth Circuit has repeatedly required arbitration of disputes, even those disputes subject to resolution by the Board, so long as there is no inconsistent Board determination. See United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371 (9th Cir. 1984); Hospital and Insitutional Workers Union Local 250 v. Marshall Hale Memorial Hospital, 647 F.2d 38 (9th Cir. 1981) and Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496 (9th Cir. 1976). As we have shown above the Board has expressly sanctioned the arbitration process and declined to find that the Union's pursuit of this grievance to be violative of the Act. Indeed, the employer as of this date has not sought any further

review from the Board that the confirmation of the arbitration award would be unlawful.

Thus, this case falls squarely within the confines of those Ninth Circuit cases which have held that arbitration may precede so long as there in no inconsistent Iabor Board determination.

Save Mart is however correct that the Ninth Circuit has taken a more restrictive view when a party asks that the Court determine an issue which may ultimately affect the issue of representation of certain employees. Local 3-193 International Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295 (9th Cir. 1980) and Brotherhood of Teamsters Local No. 70 v. California Consolidators, Inc., 693 F.2d 81 (9th Cir. 1982), cert den., _____ U.S. ____, and Petition for Rehearing denied ____ U.S. ____ (1984). We

agree to a small degree with Save Mart's position that there is some facial inconsistency in permitting an arbitrator to make those determinations which a court may not make. Yet Save Mart has little standing to make such a complaint since the Ninth Circuit's order requiring arbitration is only consistent with its prior decisions requiring arbitration of such disputes absent the contrary board determination. Moreover, as we have shown above the issue submitted to the arbitrator was not one which can be strictly called representation because it involved various other contractual rights concerning transfers, seniority as well as the hiring procedure in the contract.

Were this strictly a case like California Consolidators supra where the District Court had initially decided the applicability of the contr-

act to the Hanford Store, we would have been forced to agree with Save Mart's position.1/ Moreover, it is not strictly such a case because of the existence of the other issues as noted which could only be resolved through arbitration.

D. It is apparent from our counter statement of the facts, that in light of the posture that the Labor Board has asserted, this case does not present the issue as posed by Save Mart. In our view, it is impossible for the Employer to assert that there is some conflict with the exclusive

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1/ Counsel of record in this case was also counsel in California Consolidators and urged this Court to grant that petition. This is however a different case for we are dealing with an arbitrator's award under circumstances where the Board has expressly encouraged the arbitration process.

jurisdiction of the Labor Board, when the Labor Board itself has sanctioned the arbitration process. In any case, in light of the arbitrator's recent decision and the pendency of litigation to confirm that award, it would not serve any judicial purpose to consider the asserted conflict between an arbitrator's decision to rule on the issues presented as opposed to whether a district court could rule on those same issues if presented initially.

IV

CONCLUSION

For the reasons suggested above, the Petition for Writ of Certiorari should be denied.

DATED: February 15, 1985

Respectfully submitted,

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